

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

ORCHARD MANOR, INC.¹

Employer

and

Case 6-UC-425

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
DISTRICT COUNCIL 85, AFL-CIO

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, a hearing was held before Thomas M. Stefanac, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.²

Upon the entire record³ in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of the Employer appears as amended at the hearing.

² Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th St., NW., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by February 13, 2001.

³ Both the Employer and the Petitioner filed briefs in this matter which have been duly considered by the undersigned. I note that the Petitioner's brief was untimely as it was mailed on the due date for receipt of briefs, and was received on the day after the due date for the filing of briefs in this matter. However, inasmuch as the issuance of this decision was not delayed as a result of the late filing of the brief, I have considered the Petitioner's brief.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

The Petitioner herein (also referred to as the Union) seeks to clarify the contractual unit of all LPNs, service and maintenance employees including nursing assistants, dietary and housekeeping employees employed by the Employer, by specifically including therein the positions of restorative nurse and treatment nurse/DME coordinator.⁴

The Petitioner contends that these positions, currently held by LPNs, are not supervisory or managerial. With respect to the restorative nurse, the Petitioner acknowledges that the position has been held by an LPN since it was created, but argues that the previous restorative nurse directly supervised five CNAs whose duties were limited to performing restorative care. Since October 1999, no CNAs have been assigned to perform exclusively restorative functions, so that the restorative nurse now monitors the CNAs working in the facility only when they perform restorative care. With respect to the treatment nurse, the Petitioner contends that this position should be included in the unit because it has been held by an LPN since January 2000. Prior to January 2000, an RN was the treatment nurse.

The Employer argues, contrary to the Petitioner, that the positions at issue herein should continue to be excluded from the unit on the ground that these positions have been excluded from the unit since they were created and/or on the ground that the restorative nurse and the treatment nurse/DME coordinator continue to be supervisors within the meaning of the Act.

The Employer is engaged in the operation of a 121-bed nursing home in Grove City, Pennsylvania, providing long term, intermediate and skilled care for the elderly. The facility is divided into two wings. "A" wing is designated as the skilled-care unit. "B" wing is designated as a unit for the care of those with Alzheimer's Disease, brain injuries and physical disabilities.

⁴ The parties' collective-bargaining agreement incorporates by reference the Board certification in Case 6-RC-7300.

The Union was certified as the exclusive collective-bargaining representative in 1976, and since then has been the recognized collective-bargaining representative for the following employees who work at the Employer's facility:

All licensed practical nurses, service and maintenance employees, including nurses' aides, dietary and housekeeping employees, and office clerical employees employed by the Employer at its Grove City, Pennsylvania facility; excluding all registered nurses and guards, professional employees and supervisors as defined in the Act.⁵

Since 1976, the Employer and the Union have been parties to successive collective-bargaining agreements, the most recent of which is effective by its terms from October 13, 1999 until September 30, 2002. There are currently approximately 45 bargaining-unit LPNs and CNAs.⁶

The facility is under the overall direction of Administrator Diane Robinson. Reporting to Robinson are Human Resources Manager/Assistant to Administrator William Adamson and Director of Nursing Susan Sterner. Reporting to Sterner are ADON Kathy Rearick, Quality Assurance/Staff Development Cindy DiBiase, Assessment Coordinator Robin Stiner, and Infection Control/Care Plan Coordinator Sandy Hinds.⁷ Also reporting to Sterner are RN Nurse Managers Anna Kaufman and Sandy Quinn⁸, Restraint Reduction Nurse Sue Rodgers, Restorative Nurse Tracey Cramer, and Treatment Nurse/DME Coordinator Cindy Davis.⁹ The Employer contends that all of the nurses reporting directly to Sterner, whether LPN or RN, as

⁵ I have taken official notice of the unit certified in Case 6-RC-7300.

⁶ The record does not reveal the number of bargaining unit service and maintenance employees and office clerical employees currently employed at the facility.

⁷ These individuals are considered by the Employer to be "upper management" staff. The record establishes that Rearick is an LPN. DiBiase, Stiner and Hinds are RNs.

⁸ Assistant Nurse Manager on A Wing Denise Hoffman, RN, reports to Kaufman. Assistant Nurse Manager on B Wing Nancy Dietz, LPN, reports to Quinn. In addition, there are shift managers on each wing who, in turn, report to the Assistant Nurse Managers.

⁹ Rodgers is an RN. Cramer and Davis are LPNs.

well as the Assistant Nurse Managers and shift nurse managers comprise its supervisory/management staff.

The facility operates on a 24-hour per day, 7-day per week basis. The nursing department works three shifts: from 6:15 a.m. to 2:15 p.m.; from 2:15 p.m. to 10:15 p.m.; and from 10:15 p.m. to 6:15 a.m. The DON, ADON, Assessment Coordinator, Infection Control/Care Plan Coordinator, Quality Assurance/Staff Development, Restorative Nurse and Treatment Nurse/DME Coordinator all work on weekdays.¹⁰

During the day shift on A wing, two RN supervisors and three LPNs are on duty. On B wing, an assistant nurse manager and an RN supervisor are on duty. A total of 9 CNAs work on the day shift covering both wings. On afternoon shift, two RNs, three LPNs and six CNAs are on duty. On night shift, one RN, two LPNs and four CNAs are on duty. The nurses working on A and B wing administer medication and perform treatments. The CNAs primarily perform direct patient care for residents. The Restorative Nurse and Treatment Nurse/DME Coordinator work throughout the facility to assess residents for, and to ensure the administration of, the Employer's restorative nursing and skin treatment programs, respectively.

Restorative Nurse

The record establishes that in 1994 the Employer developed a Restorative Nursing program, and created the position of restorative nurse to oversee the program. The position of restorative nurse has historically been considered by the parties as a non-bargaining unit, supervisory position. At all times since 1994 the position of Restorative Nurse has been filled by an LPN.

The record establishes that Tracey Cramer, LPN, was promoted to the position of Restorative Nurse in October 1999. Cramer's predecessor, Pam Stewart, held the position from 1995 until October 1999. In October 1999, there was a strike at the facility among the

¹⁰ The record indicates that, at times, the treatment nurse/DME coordinator and restorative nurse will work on other shifts to train staff.

bargaining-unit employees. Restorative Nurse Pam Stewart resigned during the period of the strike and Cramer filled the position.¹¹

The record indicates that all residents are evaluated to determine whether they should be included in one of the Employer's four therapy programs.¹² At the time of the hearing, 85 percent of the residents were receiving therapy. The Restorative Nursing program, or functional maintenance program, was designed to provide continuing treatment to residents who no longer require skilled therapy care, but who qualify for continued exercise programs or treatment modalities.

The restorative nurse works with the therapy department to determine whether residents qualify for the restorative nursing program. If so, the restorative nurse informs the appropriate nurse manager and records all changes to the resident's care plan to reflect the exercise or restorative nursing program the resident must follow. The restorative nurse also instructs LPN and CNA staff on properly performing the various restorative treatments. If problems arise with a particular resident, Cramer will assist the LPN or CNA to solve the problem or reassess the resident so that the treatment is ultimately administered. The restorative nurse provides training, assesses residents and monitors the performance of LPNs and CNAs to ensure that the program is carried out correctly.

Before October 1999, the Employer designated five CNAs as restorative aides. These five CNAs reported directly to the Restorative Nurse and performed work limited to restorative treatments. Due to the loss of staff and other administrative changes, in October 1999, the Employer ceased having the five CNAs assigned to the restorative nursing program. Since then, all CNAs at the facility have been "general duty" CNAs who are assigned to work on the

¹¹ From 1996 until October 1999, Cramer held the position of Restraint Reduction Nurse, also considered by the parties to be a non-bargaining unit, supervisory position.

¹² The four therapy programs offered by the Employer are occupational therapy, speech therapy, physical therapy and geropsych therapy.

floor, and who perform restorative treatments on the residents for whom they also perform direct patient care. The record indicates that before October 1999, the restorative nurse prepared the work schedule for the restorative CNAs, subject to DON approval. Since October 1999, the weekly work schedule for all CNAs has been prepared by the DON.

A new job description for the position of restorative nurse was drafted in October 2000 to combine the language of two previous job descriptions. However, the record establishes that no new duties have been added to the position.

Treatment Nurse

The position of treatment nurse has existed at the facility for many years,¹³ and, like the restorative nurse, has historically been considered by the parties to be a non-bargaining unit supervisory position. On January 3, 2000, the Employer hired Cynthia Davis, LPN, to fill the position of treatment nurse. At that time, the Employer added certain duties to the position and changed the title of the position to Treatment Nurse/DME coordinator.¹⁴ Before Davis was hired, the position was held by RN Ragnelli. Ragnelli vacated the position to assume the position of the Assistant Nurse Manager on A wing.

The duties of the treatment nurse are to assess the skin condition of each resident. Skin care treatments are necessary with elderly residents to avoid deterioration of the skin. Such treatments are assigned to nurses at the facility.¹⁵ The treatment nurse checks every new resident for any skin conditions, and photographs and documents all conditions before instructing the staff as to the care of the resident's skin. A plan of care is then developed for each resident.

¹³ The record indicates that the position has been in existence since before 1988, the year that DON Sterner began working at the facility.

¹⁴ DME is the acronym for durable medical equipment. Durable medical equipment is any equipment required in order to restore a resident to normal functioning, including oxygen, dressing supplies and specialty beds.

¹⁵ CNAs are not permitted to perform skin treatments other than applying lotion.

Skin condition is classified in four stages. The first two stages are less serious skin conditions which can be treated by LPNs. The stage three and four skin conditions, which are more serious in nature, are personally handled by the treatment nurse.¹⁶ When she deems it to be necessary, the treatment nurse will call a skin care specialist to the facility for a consultation.

With respect to the coordination of durable medical equipment, Davis orders needed rental equipment or purchases equipment for the Employer. In this capacity, Davis contacts vendors and negotiates rates. Davis also reviews bills to ensure that the Employer is billed correctly before authorizing payment for bills. The annual budget of the DME coordinator is between \$100,000 and \$200,000, depending on the Employer's census.

The record establishes that the Union has not sought to bargain with the Employer regarding the restorative nurse and treatment nurse positions. It appears from the record that LPN Cramer was working in the position of restorative nurse when the parties entered into the current contract. The record also indicates that Cramer assumed the position after the change regarding the assignment of CNAs had already taken place.

With respect to the Treatment Nurse position, there have been no changes in the duties performed with respect to the Employer's skin care program. As stated, the incumbent in this position changed when RN Ragnelli became an Assistant Nurse Manager and LPN Davis was hired. The record reveals that, as of January 2000, this position has included the additional responsibility of overseeing the Employer's inventory, rental and purchase of durable medical equipment.

The threshold issue to be determined is whether the petition herein may appropriately be utilized to modify the parties' bargaining unit. The Board described the purpose of unit clarification proceedings in Union Electric Company, 217 NLRB 666, 667 (1975), as follows:

¹⁶ Skin deterioration in elderly residents, if untreated, rapidly results in open wounds which are painful to the resident and extremely costly to treat.

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category - excluded or included - that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals....

See also Massachusetts Teachers Association, 236 NLRB 1427, 1429 (1978).

The Board has held that to permit clarification during the course of a contract specifically dealing with a disputed classification would mean that one of the parties would be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition. Edison Sault Electric Company, 313 NLRB 753 (1994); San Jose Mercury and San Jose News, 200 NLRB 105, 106 (1972); Monongahela Power Company, 198 NLRB 1183 (1972). Moreover, where the disputed classification is not specifically dealt with in the unit description, but for some time has been treated as excluded from the bargaining unit, the Board has further explained that:

The limitations on accretion...require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.*

Robert Wood Johnson University Hospital, 328 NLRB No. 131, slip op at 3 (1999), quoting United Parcel Service, 303 NLRB 326, 327 (1991).

In Robert Wood Johnson University Hospital, supra, the Board found that per diem nurses had been historically excluded from the unit and could not be added to a unit of full-time and regular part-time registered nurses by means of unit clarification. The Board so concluded notwithstanding the increase in the number of per diem nurses utilized or the increase in the number of hours worked by individual per diem nurses. The Board noted that, as here, there

was no evidence that the parties considered the positions to be covered by the collective-bargaining agreement or that the parties ever bargained about the positions. In Swedish Medical Center, 325 NLRB No. 124 (1998), the Board found that the newly created position of managed care home health coordinator was substantially the same as home care coordinator, a position historically included in the unit. Consequently, the Board declined to exclude the position from the unit notwithstanding the further argument that the duties of the position had changed. Inasmuch as the basic responsibilities remained the same, the Board determined that there was insufficient evidence to establish that the duties changed in a substantial or significant way.

In the instant case, it is undisputed that the positions of Restorative Nurse and Treatment Nurse have historically been excluded from the unit. Based on the record herein, I find that the duties of these positions have not undergone such recent substantial or significant changes as to warrant the conclusion that a real doubt exists as to whether the positions should continue to be excluded.

Prior to October 1999, the Employer assigned five CNAs to the Restorative Department and the work of these particular CNAs was limited to assisting residents with their restorative programs. Since October 1999, the Employer has discontinued assigning five of its CNAs to perform exclusively restorative programs with residents, and has assigned these CNAs to work on resident wings. Consequently, since October 1999 all CNAs have performed restorative duties with the residents for whom they provide direct patient care. Although the restorative nurse no longer completes the schedule for CNAs and does not complete their daily work assignments, her position and duties vis-a-vis the staff who perform the programs on the residents have not changed. Cramer's primary functions, like those of her predecessor, include coordinating the restorative nursing program, instructing staff as to functional maintenance and restorative nursing programs and completing all necessary documentation for the programs. Cramer continues to monitor CNAs' performance of restorative duties.

With respect to the Petitioner's argument that Cramer's predecessor, who was also an LPN, evaluated the performance of restorative CNAs, the record reflects that employee evaluations have not been given in the several years before Cramer became the restorative nurse.¹⁷ Thus, it appears that any wage increases which have been effectuated have been based on the collective-bargaining agreement and not on any evaluation system previously in effect.

The Petitioner's argument with respect to the treatment nurse focuses on the fact that the position was previously filled by an RN, but has been filled by an LPN since January 2000. It is undisputed that Davis performs the same treatment nurse duties as her predecessor. Specifically, she assesses the skin integrity of residents, monitors treatments given by LPNs, performs necessary treatments on severe skin conditions and instructs staff regarding proper treatments. In addition, Davis is responsible for coordinating the Employer's durable medical equipment, an additional job function not performed by Davis' predecessor. Inasmuch as the record clearly indicates that LPNs have historically occupied various non-bargaining unit positions (e.g. assistant nurse manager, restraint reduction nurse, restorative nurse and ADON) at this facility, and that the duties and functions of the treatment nurse position in dispute remains substantially unchanged, I cannot conclude that the fact that the treatment nurse position is now filled by an LPN warrants the accretion of that position into the bargaining unit.

Based on the record herein, the positions in dispute are essentially the same as when the parties agreed that they should be excluded from the unit. In light of the fact that these positions have historically been excluded from the bargaining unit and the positions have not undergone recent significant or substantial changes in their duties and responsibilities, a finding

¹⁷ The only bargaining unit LPN who testified at the hearing stated that she had not received an evaluation in five to six years. Likewise, the bargaining unit CNA who testified at the hearing was designated as a restorative CNA prior to October 1999. This CNA testified that she was unable to recall whether she received an evaluation while Stewart was the restorative nurse.

that the employees occupying these positions must be included in the bargaining unit through the instant clarification proceeding is unwarranted.

Moreover, in Bethlehem Steel Corporation, 329 NLRB No.32 (1999), the Board declined to entertain a petition to clarify the status of positions which had been excluded from the unit for at least eight years. The Board noted that the positions at issue had been historically excluded from the bargaining unit, and that employees in the disputed positions retained basically the same job functions as they had before the execution of the parties' most recent collective-bargaining agreement. Thus, the Board concluded that the positions had undergone no substantial changes, and that a unit clarification proceeding was not appropriate to resolve the matter.

Based upon the above, and the record as a whole, I find that the issues involved herein cannot be resolved through the instant unit clarification proceeding. Therefore, I need not reach the issue of the supervisory or managerial status of either the restorative nurse or the treatment nurse/DME coordinator.

I shall, therefore, dismiss the petition herein.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

Dated at Pittsburgh, Pennsylvania, this 30th day of January 2001.

/s/Gerald Kobell

Gerald Kobell
Regional Director, Region Six

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